No. 00-261

Supreme Court, U.S.
FILED
AUG 23 2000

IN THE

Supreme Court of the United States

STATE OF NEW YORK, *EX REL.*
ATTORNEY GENERAL ELIOT SPITZER, *ET AL.*,

Petitioners,

—v.—

MICROSOFT CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR DISTRICT OF COLUMBIA CIRCUIT

MICROSOFT'S BRIEF IN OPPOSITION

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August 23, 2000

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List of Parties and Rule 29.6 Statement

The parties to the consolidated proceedings before the United States District Court for the District of Columbia were respondent Microsoft Corporation, plaintiff the United States of America and petitioners the District of Columbia and the States of California, Connecticut, Florida, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, New Mexico, New York, North Carolina, Ohio, South Carolina, Utah, West Virginia and Wisconsin. South Carolina withdrew from the case during trial.

Microsoft Corporation has no corporate parents, and no publicly held company owns 10% or more of Microsoft Corporation's stock.

Respondent Microsoft Corporation ("Microsoft") respectfully requests that the Court deny the States' petition for a writ of certiorari before judgment.[1]

Reasons Why the Petition Should Be Denied

If the Court denies the direct appeals in No. 00-139, then the States' petition obviously should be denied, and both of Microsoft's appeals should be remanded to the court of appeals. For the reasons stated in Microsoft's jurisdictional statement and reply in No. 00-139, the Court should follow this course, which will result in Microsoft's appeals being heard by a single court—the court of appeals—in accordance with normal appellate practice. The States' petition also should be denied because the case does not satisfy Rule 11's demanding standard for petitions for certiorari before judgment.

I. This Case Is Not of Such Imperative Public Importance as To Require Immediate Review by This Court.

The States seek to invoke the jurisdiction of this Court pursuant to Rule 11, which provides that a petition for writ of certiorari before judgment "will be granted only upon a showing that the case is of such imperative public importance as to justify a deviation from normal appellate practice and to require immediate determination in this Court." The States have not shown—nor can they show—that their case meets that very demanding standard.

This Court has "rarely" exercised its power to grant certiorari before a court of appeals has had an opportunity to review the decision below. *Aaron* v. *Cooper*, 357 U.S. 566, 567 (1958). In fact, certiorari before judgment has typically

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[1] The States explain that they have filed their petition as a "precautionary measure" (Pet. at 1; *see also id.* at 2) to be considered if the Court determines that the Expediting Act, 15 U.S.C. § 29(b), does not confer jurisdiction over Microsoft's appeal of the States' separately-filed action in No. 00-139.

been granted only "in cases of great constitutional significance and of extraordinary national importance for other reasons." ROBERT L. STERN, ET AL., SUPREME COURT PRACTICE § 4.20, at 199 (7th ed. 1993) (footnote omitted). The States concede as much, noting that certiorari before judgment has been granted only "where immediate Supreme Court review was necessary to resolve expeditiously questions of *exceptional and wide-ranging public importance*." (Pet. at 5 (emphasis added).) This is not such a case.

Although the judgment below is a threat to Microsoft's corporate existence and raises substantial issues of law, the States' suggestion that this case involves important issues of constitutional dimension similar to those present in the cases cited in their petition (Pet. at 2, 5, 7) is unfounded. *See Mistretta* v. *United States*, 488 U.S. 361, 362 (1989) (constitutionality of federal sentencing guidelines); *Dames & Moore* v. *Regan*, 453 U.S. 654, 667 (1981) (constitutionality of Executive Orders resolving Iran hostage crisis); *United States* v. *Nixon*, 418 U.S. 683, 703 (1974) (validity of President's broad assertion of executive privilege); *Reid* v. *Covert*, 354 U.S. 1, 3 (1957) (constitutionality of court marshal proceedings against civilians); *Bolling* v. *Sharpe*, 347 U.S. 497, 498 (1954) (constitutionality of racial segregation in public schools).

The States make little effort to explain why this case meets the requirements of Rule 11. Instead, they baldly assert that the case poses "the most pressing and important public questions under the antitrust laws to come before this Court since . . . 1974." (Pet. at 6.) Even if that were true, the case is still a far cry from constitutional crises such as Watergate that threaten the failure of government. This is simply not one of the handful of extraordinary cases where certiorari before judgment is appropriate.

II. Granting the States' Petition Would Be Contrary to Normal Appellate Practice.

The States devote the majority of their petition to arguing that certiorari before judgment here would "aid" the Court in its direct review of the DOJ's case and avoid having Microsoft's two appeals heard by different courts. The States claim that Microsoft is asking the Court to "deviate in this proceeding from the normal appellate practice with respect to fully consolidated cases." (Pet. at 9.) But if the States' case is not subject to the Expediting Act, which is the necessary premise of their petition, then it is the States that are requesting a dramatic departure from normal appellate practice. One need only review the four questions presented in the States' petition (which the DOJ characterizes as seven different questions in its brief supporting the States' petition) to see that this case is wholly unsuitable for a grant of certiorari in its present posture.[2] Rather than presenting narrow legal issues that are plainly worthy of this Court's consideration, the States ask the Court to conduct sweeping inquiries into whether the district court's findings of fact and conclusions of law regarding each of the basic legal theories of this case—together with the unprecedented relief awarded—are sustainable. Such plenary review of a complex factual record that raises a broad array of legal and procedural issues would impose substantial burdens on the Court and would be contrary to the Court's normal certiorari practice.

The States assert that granting certiorari "would be consistent with the Court's practice of ensuring that an entire consolidated proceeding is before it on direct review." (Pet. at 9.) There is no such practice. In *United States* v. *National*

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[2] If the Court grants this petition, the Court should review the States' case in its entirety. The "questions presented" would thus include all of the issues set out in Microsoft's jurisdictional statement in No. 00-139, including the States' claims under their own antitrust statutes and Microsoft's counterclaims under 42 U.S.C. § 1983.

Association of Securities Dealers, Inc., 422 U.S. 694, 703 n.12 (1975), this Court heard a direct appeal of an antitrust action brought by the DOJ pursuant to its then-mandatory jurisdiction under the Expediting Act. The Court nevertheless denied a petition for certiorari before judgment in a closely-related private action that had been considered together with the DOJ's action in the district court. *See* 422 U.S. at 700 n.5. It is thus inaccurate to suggest, as the States do, that this Court invariably grants certiorari before judgment in such circumstances so that closely-related actions can be considered together. In any event, certiorari before judgment is not appropriate unless the case satisfies the standard set out in Rule 11, which this case clearly does not.

The States also wrongly suggest that "consolidation of the related appeals in this Court offers the only way to resolve the entire judgment." (Pet. at 7.) In each of the cases on which the States rely (*id.* at 6-8), this Court had *mandatory* jurisdiction over the primary case, and thus the only way to avoid having related cases resolved by different courts was to grant certiorari before judgment. *See Roe* v. *Wade*, 410 U.S. 113 (1973) (review of decision of three-judge panel, which, under 28 U.S.C. §1253, was appealable only to Supreme Court); *Brown* v. *Board of Education*, 344 U.S. 1 (1952) (same); *Reid* v. *Covert*, 354 U.S. 1 (1957) (review of decision of district court striking down act of Congress, which, under 28 U.S.C. § 1252 (now repealed), was appealable only to Supreme Court).[3] Here, the Court

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[3] The States improperly rely on *Clinton* v. *City of New York*, 524 U.S. 417 (1998), for the proposition that certiorari before judgment is warranted when one of the parties to a consolidated proceeding is entitled to a direct appeal to the Supreme Court. (*See* Pet. at 7-8.) The Court ruled in *Clinton* that certiorari before judgment was not necessary because 2 U.S.C. § 692(b) provided the Court with jurisdiction over *both* of the appeals at issue. 524 U.S. at 429 & n.14. Justice Scalia's view that certiorari before judgment would have been appropriate in *Clinton* was based on the "public importance" of the Court's immediate consideration

does not have mandatory jurisdiction over *either* of Microsoft's appeals, and thus has a superior option available to it to ensure that the entire proceeding is reviewed by a single court. The Court has unqualified discretion under the Expediting Act to remand the DOJ's action to the court of appeals and equally unqualified discretion to deny the States' petition for certiorari. The Court should exercise that discretion so that both cases can proceed along the normal course of appellate review.

The court of appeals can give full consideration to all of the issues relevant to both of Microsoft's appeals. By ordering that the appeals be heard immediately by the court sitting *en banc*, the court of appeals has demonstrated that it is ready, willing and able to deal with those appeals appropriately.

Conclusion

For the foregoing reasons, the States' petition for writ of certiorari before judgment should be denied.

Respectfully submitted,

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of the constitutionality of the Line Item Veto Act. *Id.* at 455 (Scalia, J., concurring in part and dissenting in part). As noted previously, this case does not raise issues with similar consequences for the ongoing operations of the federal government.